

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PANLIANT FINANCIAL CORPORATION,
et al,

Plaintiffs,

v.

ISEE3D, Inc. *et al*,

Defendants.

Case No. 2:12-cv-01376-RFB-CWH

ORDER

I. INTRODUCTION

Plaintiffs bring this action alleging violations of the state and federal RICO statutes and various state law violations. This case arises from facts surrounding: the allegedly fraudulent activities of the Defendants to avoid debts owed to Plaintiffs A.G. Solutions, Ltd. and Panliant; the improper termination of Plaintiff Smith from his position with Defendant ISEE3D; and improper disgorgement of Smith's ISEE3D shares. Before the Court is Defendant Geoghegan's Motion for Summary Judgment. ECF No. 111. For the reasons stated below, Defendant Geoghegan's motion is GRANTED.

II. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on August 3, 2012. ECF No. 1. Plaintiffs filed an Amended Complaint on December 3, 2012. ECF No. 4.

Defendant filed a Motion to Dismiss on August 8, 2013. ECF No. 28. On December 9, 2013, the Court granted Defendant's Motion as to Plaintiffs' Causes of action numbers 8, 11, and 12. ECF No. 36.

1 On March 25, 2014, Defendant Bay Management filed a Motion to Dismiss. ECF No. 41.
 2 The Court granted this motion on July 21, 2014. ECF No. 70.

3 On March 23, 2015 Defendant Geoghegan filed a Motion for Summary Judgment. ECF
 4 No. 111.

5 On September 4, 2015, this Court adopted a report and recommendation granting default
 6 against Defendant Romanica. On September 30, 2015, Plaintiffs filed for a Motion for Default
 7 Judgment against Romanica. ECF No. 131. This motion is unopposed. The Court granted
 8 Plaintiff's motion on February 17, 2016. ECF No. 141.

9 Therefore, the sole remaining defendant is Defendant Geoghegan.

11 **III. LEGAL STANDARD**

12 Summary judgment is appropriate when the pleadings, depositions, answers to
 13 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
 14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
 15 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In ruling on a
 16 motion for summary judgment, the court views all facts and draws all inferences in the light most
 17 favorable to the nonmoving party. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th
 18 Cir. 2011).

19 Where the party seeking summary judgment does not have the ultimate burden of
 20 persuasion at trial, it "has both the initial burden of production and the ultimate burden of
 21 persuasion on a motion for summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
 22 Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). "In order to carry its [initial] burden of
 23 production, the moving party must either produce evidence negating an essential element of the
 24 nonmoving party's claim or defense or show that the nonmoving party does not have enough
 25 evidence of an essential element to carry its ultimate burden of persuasion at trial." Id. If the
 26 movant has carried its initial burden, "the nonmoving party must produce evidence to support its
 27 claim or defense." Id. at 1103. In doing so, the nonmoving party "must do more than simply show
 28 that there is some metaphysical doubt as to the material facts Where the record taken as a

1 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
2 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
3 marks omitted). However, the ultimate burden of persuasion on a motion for summary judgment
4 rests with the moving party, who must convince the court that no genuine issue of material fact
5 exists. Nissan Fire, 210 F.3d at 1102.

6 7 **IV. UNDISPUTED FACTS**

8 Defendant Dwight Romanica and Plaintiff Alan Smith were each equal owners and
9 shareholders in Plaintiff Panliant Financial Corporation. Panliant contracted with Defendant
10 ISEE3D, Inc. ("ISEE3D") in August 2007, for certain consulting services to restructure the
11 corporate structure of ISEE3D. Plaintiff Smith was the CEO and later CFO of ISEE3D.

12 ISEE3D retained Bay Management, Ltd., a company owned by Defendant Geoghegan, to
13 perform consulting services. Pursuant to the Agreement that Bay Management had with ISEE3D,
14 dated August 11, 2008, Bay Management would be responsible for: (1) the company's financial
15 reporting and budgeting; (2) the drafting and maintenance of the company's business plans; (3)
16 development of presentation materials and attendance as required at financial presentations for and
17 on behalf of the company; and (4) attending investor relations activities as determined from time
18 to time by the company. Defendant Geoghegan’s involvement with ISEE3D ended in 2009.

19 While consulting for ISEE3D, Defendant Geoghegan discovered what he believed to be
20 unethical activities performed by Plaintiff Alan Smith, including writing himself checks drawn
21 from the company’s bank accounts and filing inflated expense reports. Defendant Geoghegan
22 emailed Defendant Romanica reporting his suspicions on April 23, 2009. Defendant Romanica in
23 turn altered and forwarded Defendant Geoghegan’s email to various individuals in the company,
24 some of whom believed the accusations to be false. Defendant Romanica engaged in conversations
25 with these individuals regarding Plaintiff Smith’s termination. Defendant Geoghegan was not
26 included in any of these communications after his initial email to Defendant Romanica.

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1 A board meeting was held on March 25, 2009. Subsequent to this board meeting, Defendant
 2 Geoghegan and Bay Management entered a release agreement with Plaintiff Smith and AG
 3 Solutions on April 30, 2009.

4 5 **V. ANALYSIS**

6 As an initial matter, the Court dismisses “punitive damages” and “respondeat superior” as
 7 separate causes of action, finding that punitive damages are a type of relief, and respondeat
 8 superior a theory of liability.

9 **1. Piercing the Corporate Veil**

10 Defendant Geoghegan first argues that Plaintiffs’ claims against him fail, as Plaintiffs have
 11 not pierced the corporate veil and therefore he cannot be sued individually. The Court agrees.

12 “Nevada has long recognized that although corporations are generally to be treated as
 13 separate legal entities, the equitable remedy of ‘piercing the corporate veil’ may be available to a
 14 plaintiff in circumstances where it appears the corporation is acting as the alter ego of a controlling
 15 individual.” LFC Marketing Group, Inc., v Loomis, 8 P.3d 841, 846 (Nev. 2000). “The
 16 requirements for finding alter ego and piercing the corporate veil are: (1) The corporation must be
 17 influenced and governed by the person asserted to be its alter ego; (2) There must be such unity of
 18 interest and ownership that one is inseparable from the other; and (3) The facts must be such that
 19 adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or
 20 promote injustice.” Lorenz v. Beltio, Ltd., 963 P.2d 488, 496 (Nev. 1998). “Some factors to be
 21 considered when determining if a unity exists in an alter ego analysis include, but are not limited
 22 to, commingling of funds, undercapitalization, unauthorized diversion of funds, treatment of
 23 corporate assets as the individual's own, and failure to observe corporate formalities. No one of
 24 these factors alone is determinative to apply the alter ego doctrine.” Id. at 497.

25 The burden of proof in this case falls on the Plaintiffs: “[i]n order to demonstrate a unity
 26 of interest, it is incumbent upon the one seeking to pierce the corporate veil, to show by a
 27 preponderance of the evidence, that the financial setup of the corporation is only a sham and caused
 28 an injustice.” House of Brussels Chocolates, Inc. v. Whittington, 238 P.3d 820 (Nev. 2008).

1 Defendant argues that Mr. Geoghegan's actions were taken in his position as the owner of
2 Bay Management; therefore, he cannot be held individually liable unless Plaintiffs pierce the
3 corporate veil. This is evidenced by the initial engagement letter, in which Plaintiffs retained Bay
4 Management, not Mr. Geoghegan, to perform the consulting contract: "Bay Management Ltd. will
5 operate as the finance department for ISEE3D Inc. and will assume responsibility for the
6 Company's financial reporting and budgeting, the drafting and maintenance of the Company's
7 business plans, the development of presentation materials and attendance as required at financial
8 presentations for and on behalf of the Company." MSJ, Ex. E.

9 The only language in the consulting contract suggesting that Mr. Geoghegan was retained
10 individually is in the following sentence: "Bay Management and its founder and President Mr.
11 Mark Geoghegan (hereinafter called "The Consultant") are a financial consulting Company..." Id.
12 However, the Court does not find that this language, identifying Mr. Geoghegan as Bay
13 Management's owner, creates individual liability on the part of Mr. Geoghegan. Further, there is
14 no additional document or agreement between ISEE3D and Mr. Geoghegan that would suggest
15 that ISEE3D retained Mr. Geoghegan individually, rather than through his company Bay
16 Management.

17 This interpretation is supported by the Mutual Release Agreement (MSJ, Ex. F), which
18 indicates that the agreement was made between AGS, ISEE3D, and Bay Management—not Mr.
19 Geoghegan. The Release Agreement expressly covers "any Claim arising in relation to the
20 consulting contract between *Bay Management, AGS and ISEE3D Inc.* dated August 11, 2008." Id.
21 (emphasis added).

22 Plaintiffs ask the Court to find that Mr. Geoghegan is individually liable for Bay
23 Management's actions, despite having contracted with Bay Management to perform the contract
24 in question, merely because Mr. Geoghegan was referenced in a consulting agreement as the owner
25 and president of the company. The Court declines to extend such individual liability in instances
26 of sole proprietorships.

27 Thus, Plaintiffs have failed to meet their burden to persuade this Court to pierce the
28 corporate veil and find Mr. Geoghegan is the alter ego of or is unified with Bay Management.

1 Therefore, the Court finds that Plaintiffs have failed to allege a cause of action against Mr.
 2 Geoghegan individually, which disposes of the breach of implied covenant of good faith and fair
 3 dealings claim.

4 **2. Lack of evidence to establish fraud or misrepresentation claims, and**
 5 **therefore the remaining claims of civil conspiracy and RICO claims**

6 Although Mr. Geoghegan cannot be held individually liable for conduct as a consultant for
 7 Bay Management, and his employment under the Bay Management contract, Mr. Geoghegan may
 8 still be liable for fraudulent acts or misrepresentations, and therefore the remaining claims. He
 9 argues, however, that Plaintiffs have failed to prove the elements of their fraud and
 10 misrepresentation claims against him. The failure to do so in turn defeats Plaintiffs' civil
 11 conspiracy and RICO claims, which are based on mail and wire fraud. The Court agrees.

12 Fraud, negligent misrepresentation, and intentional misrepresentation each require that the
 13 defendant knows or believes her representations to be false. See Barmettler v. Reno Air, Inc., 956
 14 P.2d 1382, 1386-87 (Nev. 1998) (fraud requires "defendant's knowledge or belief that its
 15 representation was false or that defendant has an insufficient basis of information for making the
 16 representation" and negligent misrepresentation applies where one "supplies false information for
 17 the guidance of others in their business transactions"); Foster v. Dingwall, 227 P.3d 1042, 1052
 18 (Nev. 2010) (intentional misrepresentation requires "a false representation that is made with either
 19 knowledge or belief that it is false").

20 However, the Court finds no evidence that Defendant Geoghegan knew, had reason to
 21 know, or believed that his statements regarding Plaintiff Smith's alleged behavior, to be false.
 22 While Plaintiffs argue that Defendant *Romanica* was provided with information from ISEE3D
 23 employees that might have given him reason to believe Mr. Geoghegan's accusations were false,
 24 Defendant Geoghegan himself was not included in any of these communications. To the extent
 25 that Plaintiffs allege the falsity of these statements was revealed or suggested at the Board Meeting
 26 that Plaintiffs maintain Defendant Geoghegan attended, no evidence supports this. For example,
 27 there are no minutes of this Board Meeting. Therefore, the Court does not find that Plaintiffs have
 28 satisfied their burden as to their fraud, intentional misrepresentation, or negligent

1 misrepresentation claims. Because Plaintiffs' RICO charges are predicated on mail and wire fraud,
2 which requires the specific intent to defraud, these claims also fail. See Eclectic Properties E., LLC
3 v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014). Similarly, Plaintiff's civil
4 conspiracy claim fails, where no unlawful objective has been established by the evidence. See
5 Guilfoyle v. Olde Monmouth Stock Transfer Co., 335 P.3d 190, 198-99 (Nev. 2014) (internal
6 quotations omitted).

7 The Court therefore GRANTS Defendant's Motion for Summary Judgment (ECF No.
8 111).

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10 **VI. CONCLUSION**

11 For the reasons stated above and at the hearing in this case, IT IS ORDERED that
12 Defendant's Motion for Summary Judgment, ECF No. 111, is GRANTED. The Clerk of Court is
13 instructed to close this case.

14 **DATED** April 26, 2016.



15 RICHARD F. BOULWARE, II
16 UNITED STATES DISTRICT JUDGE
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